JD–31-03
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EASTERN SUMMIT DEVELOPMENT, INC.

and Case No. 3-CA-23610

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCALS
17-17A-17B-17C-17D-17RA-17S

Beth Mattimore, Esq., for the General Counsel
Michael R. Moravec, Esq., of Buffalo New York for
the Respondent.
Gerald Franz of West Seneca, New York,
for the Charging Party

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Buffalo, New York on December 3, 2002. The charge and amended charge were filed by the International Union of Operating Engineers, Local 17-17A-17B-17C-17D-17RA-17S (the Union or Local 17) against Eastern Summit Development, Inc. (Respondent) on May 9, 2002, and June 2, 2002, respectively.[1] The charge and amended charge resulted in the issuance of complaint alleging, as amended at the hearing, that since April 8, Respondent has refused to consider for hire and refused to hire: Jerry Franz, Mike Eddy, Dave Saviano, Steve Boyd, Tom Catras, John Flisakowski, James L. Minter III, Tom Kaszubowski, Gary Senozetnik, Carl Larson, Chris Forward, Eric Maybee, Angelo Fasso, Herman Pryll, Angela Lambert, James Earhardt, Tom Paluch, and Wes Kless in violation of Section 8(a)(1) and (3) of the Act, and that on or about April 15, Respondent by its agent and supervisor Peter Crone told or implied to an applicant he was reluctant to hire the applicant because he did not want to get involved with the Union in violation of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, engages in business as a site work contractor from its facility in Springville, New York (Respondent's office), where it annually provides services valued in excess of $50,000 for public sector entities which are directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within

[1] All dates are in 2002 unless otherwise indicated.

the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices[2]

A. Respondent's operations

Brothers Peter and Philip Crone own Respondent and are its chief operating officers.[3] Respondent performs excavation work and has been in business for over 25 years, the last 20 of which it has been engaged in its current operations. Respondent employs 20 to 25 employees during the May to November construction season.

The complaint alleges, and Respondent denies, P.J. Crone is a statutory supervisor and agent with the meaning of Section 2(11) and 2(13) of the Act. The credited evidence establishes that P.J. Crone, a close relative of the owners, works in Respondent's office and is charged with dispensing to and receiving completed employment applications from applicants. P.J. Crone answers applicants' questions, tells applicants whether Respondent is hiring, and has advised applicants that Respondent has a policy of retaining applications forever, and that once an application is filed there is no need to reapply to be considered for future employment opportunities.[4] I find that P.J. Crone serves as an agent of Respondent within the meaning of Section 2(13) of the Act concerning his statements to applicants because Respondent has placed him in a position with apparent authority.[5] See, *Nelson Electrical Contracting Corp.,* 332 NLRB No. 17, slip op. at 1, fn. 4 (2000) enfd. 171 LRRM 2512 (2nd Cir. 2002); and *Diehl Equipment Co.,* 297 NLRB 504, fn. 2 (1989).

Peter Crone testified to the following: Respondent employs truck drivers, a mechanic, operators, and laborers. There are three truck drivers, one who drives a lowboy requiring a class A commercial drivers license (CDL), and two dump truck drivers who require class B CDL's.[6] Operators for Respondent operate the following equipment: bulldozers, excavators,

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[2] In making the findings below, I have considered the demeanor of all witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See*, NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

[3] Respondent admits that Philip and Peter Crone are supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

[4] The forgoing findings were based on the credited testimony of Union Organizer Gerald Franz. P.J. Crone was not called to testify. I do not credit the testimony of Peter Crone that Respondent had a fixed procedure of disposing of its applications at year's end. First, it is apparent that P.J. Crone, whose function is to receive and maintain applications, was not told of this policy and in fact told applicants that the opposite was true. Second, although the hearing took place in December 2002, Respondent was able to produce its 2001 applications in response to a subpoena request. Third, Peter Crone hired Chad Phinney in 2002, based on Phinney's 2001 application. While Phinney contacted Respondent again in 2002 seeking employment, he was not required to submit a new application. I have concluded, considering the witnesses' demeanor, that Respondent had no policy of disposing of applications at year's end and that, as P.J. Crone informed applicants, Respondent maintained applications for its hiring pool for an unlimited time period.

[5] The General Counsel did not present evidence sufficient to warrant a finding that P.J. Crone is a statutory supervisor.

[6] A class A CDL driver can drive trucks requiring a class B CDL. The opposite is not true.

loaders, and graders. Respondent performs two types of work, prevailing wage for government contracts and commercial work for private industry. Operators are paid $14 to $17 and laborers $10 to $13 an hour for commercial work. Depending on the workload, operators may spend up to 20 to 30 percent of their time performing laborer's work. When an operator performs laborer's work they do the same work as a general laborer. Most of Respondent's laborers spend some of their time doing operator's work by operating heavy equipment. On commercial projects, an operator's rate of pay does not decrease when performing laborer's work and a laborer's pay does not increase when performing operator's work. On prevailing wage projects, an operator is paid at the laborer rate when performing laborer's work and a laborer is paid at the operator rate when performing operator's work.

General Counsel witness George Dewald worked for Respondent for around 16 years until he left in July 2001 to work for a Local 17 contractor. Dewald confirmed all Respondent's employees perform a variety of tasks. Dewald testified that in 2001 he predominately worked as an operator at a rate of $15.25 to $15.50 for commercial work.[7] A Local 17 contractor employed General Counsel witness Stephen White, at the time of the hearing. White worked for Respondent from February 1995 until September 2001, during which time he left Respondent's employ for a year to work for another contractor. Peter Crone told White, at the time he was hired, that Respondent wanted a versatile employee who could work as a laborer, operator, and drive a truck. White was hired as a lead man-operator but his classification changed to laborer-mason as reflected in lists Respondent distributed to employees. White testified that he spent most of his time performing laborer's work and concrete and masonry work at Respondent. White testified he performed no operator's work for Respondent in 2001 and that he was paid at the rate of $13.50 an hour for commercial jobs. General Counsel witness current employee Chad Phinney testified he was hired as an operator and laborer and he spends 50 percent of his time performing each category of work. Phinney is paid $10 an hour on commercial jobs.[8] Phinney testified some of Respondent's employees work exclusively as operators. I have concluded, based on his wage rate, that Phinney was hired as a laborer, although he spends a substantial amount of time performing operator's work.[9]

B. The employment applications of union members

1. The 2001 applications of union members

On March 11 and March 12, 2001, Respondent ran an ad for laborers and equipment operators in the Buffalo News.[10] On March 12, 2001, union member David Saviano applied for

[7] I do not credit Dewald's testimony that Respondent's employees did not differentiate as to whether they were classified as laborers or operators. This claim is undercut by General Counsel witness White's testimony that Respondent on occasion distributed lists to employees setting forth their classifications. Moreover, the testimony of General Counsel's witnesses confirms that of Peter Crone that employees performing predominantly operating work were paid at a higher rate for commercial work than those generally classified as laborers.

[8] Phinney testified his pay records would show whether he worked as an operator or a laborer on prevailing wage jobs. These records were not introduced into evidence.

[9] Peter Crone testified Phinney was hired as a laborer who spends 10 to 15 percent of his time operating heavy equipment. Considering the demeanor and interests of the witnesses, I have concluded, as set forth above, that Phinney spends more time operating heavy equipment than Peter Crone was willing to admit.

[10] Peter Crone testified Respondent ran an ad in the spring of 2001 in the Buffalo News for all positions. The General Counsel also entered into evidence a copy of the invoice for the ad,

Continued

work at Respondent. On March 13, 2001, Local 17 Organizer Franz, accompanied by applicants Thomas Catras, Michael Eddy, John Flisakowski, Chris Forward, Eric Maybee, Thomas Pollack, II, Herman Pryll, and Stephen Boyd, applied for work at Respondent's office. Franz and some of the other applicants wore union attire. Franz testified the applicants applied in response to a newspaper ad seeking operators and laborers.[11] P.J. Crone provided applications to the applicants, who filled them out and turned them in. Franz' credited testimony reveals P.J. Crone said the applications were good forever because it was beneficial to maintain a pool of applicants. P.J. Crone said Respondent was not busy at the time.

There were nine applications from the alleged discriminates dated March 13, 2001, produced at the hearing. Each of the applications, save the one filed by Franz, contains a letter identifying the applicant as a Local 17 member, or as a Local 17 voluntary organizer, or both. Franz' application states he is a paid organizer for Local 17. The contents of the March 12 and March 13 union applications are summarized as follows:

> Boyd applied for an operator position. He did not list a desired salary. Boyd listed his last wage rate at $24.32 an hour. He stated he had 28 years experience as an operating engineer, and that he could operate a loader, dozer, excavator, and backhoe. He stated he had several years experience painting and in trucking.
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> Catras applied for an operator position and requested the prevailing wage. Catras listed his last wage rate as $24.35 an hour. He said he had 36 years experience, and that he could operate a dozer, hoe, and loader. He said he has a class A CDL.
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> Eddy applied for all positions stating his requested wage was open. His prior employment stated he was an operator paid "rate". He said he had 11 years experience operating a dozer, excavator, loader, hoe, and other equipment. He listed 2 years experience as a mechanic, said he had a class A CDL, and could drive a lowboy.
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> Flisakowski applied for an operator or laborer position stating his requested wage was open. He said he earned $23.00 an hour as an operator in his last job. He listed 16 years experience operating a backhoe, dozer, loader, crane, fork truck, paver, and dump truck. He listed 16 years experience as a mechanic, welder, painter and in trucking.
>
> Franz applied for an operator or laborer position with the salary open. He said in the past he had worked as an operator for $22.35 an hour. Franz listed 12 years experience operating a dozer, loader, excavator, and other equipment. He listed some experience as a mechanic, and said that he had experience driving a lowboy and dump truck and he

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which reads under the description of the ad, "LABORERS & Equ".

[11] Franz initially testified that Saviano accompanied the applicants who applied on March 13, 2001. However, when shown Saviano's application was dated March 12, Franz testified Saviano applied before the other applicants. Based on the forgoing, I have concluded that Franz' recollection, as to who accompanied him when he applied for work was not as precise as it might have been. I have therefore concluded that the General Counsel has failed to establish alleged discriminatee Angelo Fasso applied in either March 2001 or April 2002 as Franz testified. In this regard, Respondent maintained in its files applications from all of the other alleged discriminatees save Fasso and those applications were produced at the hearing. Fasso was not called to testify to verify that he applied for work, nor were his qualifications for any of the positions sought otherwise established. Accordingly, the complaint allegations concerning Fasso are dismissed. I find Saviano applied on March 12, as set forth in his application.

had a class A CDL.

Forward applied for an operator position and did not list a desired salary or prior wage rate. He said he had 4 years of Local 17 apprenticeship training and he could operate "most everything" and he had 7 years experience. He said he had 10 years welding experience and a class A CDL.

Maybee applied for an operator or laborer position and requested the prevailing wage. All prior work listed was as an operator for which he said he received the prevailing wage. He listed 11 years experience operating a dozer, loader, grader, crane, and forklift. He said he had a class A CDL and experience driving a lowboy.

Paluch applied for an operator or laborer position, and did not specify a requested wage rate, or prior wage rates. He listed between 10 and 19 years of experience in operating the following equipment: dozer, hoe, roller, loader and forklift.

Pryll applied for the position of operator, requested an operator's salary, and said he had been employed in the past at an "operator rate." He said he had 15 years experience operating a crane, excavator, backhoe, fork truck, grader, loader, and some experience operating a dozer.

Saviano applied for an operator position with no salary specified. He listed three prior employers and said that he worked for those companies as an operator and either earned the prevailing wage or "union scale." The application states Saviano had 10 years experience operating an excavator, scraper, dozer, loader, and other equipment.

2. Statements by Respondent's officials after the union members applied for work in 2001

Former Respondent employee Dewald joined Local 17 in 1996 and he testified Peter, Phil and P.J. Crone knew of Dewald's membership shortly after he joined. Dewald saw the Local 17 members filling out applications in Respondent's office in the spring of 2001, and he testified he had a conversation with Phil Crone a couple of weeks to a month later. Dewald testified Phil Crone walked into the shop and said to mechanic Greg Bowen and Dewald that he realized they were interested in Local 17. Dewald testified, during the conversation, Phil Crone said, "we don't really want to get involved with any locals or any unions, I mean, especially the Operators, and we're not interested at all, and I don't think we'd sign a contract if you guys feel like that's something you want to do, well, we could never do that. We'd probably close the business before we'd get involved with the Union."[12] Former Respondent employee White also saw the Local 17 members in Respondent's office when they applied in 2001. He testified he had a conversation in the break room with Phil Crone after they applied. Phil Crone said that he did not see any reason for signing with the Union in that it would not benefit Respondent. He said before he signed with the Union, he would shut the doors on the place. White testified the conversation occurred around the time Local 17 Organizer Jeff Peterson informed White that Peterson had dropped off a copy of the Union's contract with Respondent.

I have concluded, after considering the demeanor of the witnesses, as well as Phil Crone's failure to testify, that, based on Dewald's credited testimony, shortly after the union

[12] Dewald testified that he did not think that he discussed the Union's rates with Phil Crone, although he might have.

applicants applied in the spring of 2001, Phil Crone told employees Dewald and Bowen that Respondent would never sign a contract, and that Respondent would probably close the business before getting involved with Local 17. Similarly, I have credited White's testimony, that around this same time period, Phil Crone told White that before he signed with the Union, he would shut the doors on the place.[13]

I have credited Dewald's testimony that, within a week of his conversation with Phil Crone, he had a conversation with Peter Crone in Crone's office. Peter Crone had the applications from the Local 17 members and he asked Dewald if he knew anything about the guys from Local 17 applying. Dewald said he knew they were here. Peter Crone asked Dewald if they expected Respondent to hire these applicants. Dewald said he assumed that is why they put in applications. Peter Crone said they would close the business before they would get involved with a union. He said if we get involved with Local 17, the laborers and carpenters would want to get involved.

Dewald also testified he thought he had a conversation in 2001 with Peter Crone where union rates were discussed where Peter Crone said he would not stay in business to lose money.[14] Peter Crone testified he told Dewald that Respondent would have to change its rate in order to pay union scale, and that they felt they would not be competitive in the commercial market.[15] Peter Crone testified he might have told Dewald that Respondent might go out of business as a result. Based on the credited testimony of Dewald and the admissions by Peter Crone, I find that in 2001, Peter Crone told Dewald Respondent would not be competitive and would not stay in business if they had to pay union rates.

3. Respondent's hiring in 2001

The parties stipulated that Respondent hired the following individuals in 2001 on the dates and to the positions set forth next to their names: David Bufton, February 19, operator; Jason Frank, April 9, laborer; George Ray, June 5, laborer; Joe Harvey, April 30, truck driver; Daniel Klein, April 30, truck driver; Steve Dallas, July 18, truck driver/mechanic; and Doug Ludlow, July 16, laborer. The applications for these employees were filed in 2001 and are summarized as follows:

Bufton's application is dated February 15. He applied for the position of operator. He failed to list a desired salary. He listed his last job as an operator, and his prior employment as a mechanic, although he put no employment dates or salary rates on the

[13] I have concluded Phil Crone did not mention that Respondent could not compete based on union rates during either of these conversations. In this regard, Dewald testified that he did not believe that he had a conversation with Phil Crone concerning union rates, and White who impressed me as a candid witness with good recall was emphatic that Phil Crone did not discuss union rates with him. Moreover, Phil Crone failed to dispute this testimony.

[14] Similarly, White testified he had a conversation in which Peter Crone said he did not know how people could survive having to pay the union rate.

[15] Peter Crone testified that in 2001 he met with Union Organizer Jeff Peterson about Respondent becoming a union company. Peterson mentioned the possibility a separate pay rate for commercial work. However, when Peterson tendered a copy of the Union's contract it had only one rate for all work. Peter Crone testified there were no further discussions with the Union because Respondent knew it could not be competitive commercially with the union scale. Peter Crone testified he had conversations with all his employees stating Respondent was very concerned about going union over its commercial rate.

application. He said he had experience operating an excavator, dozer, loader and other equipment. He said he had experience as a mechanic, welder, painter, and as a driver, but he did not set forth the amount or type of experience.

Harvey's application is dated February 20. He applied for the position of equipment operator at a requested rate of $12.50 to $14.00 an hour. He was employed at the time of his application as a truck driver, and his highest listed hourly rate was $12.50 an hour as an equipment operator. He had a class A CDL with 6 years experience operating a tractor-trailer, and dump truck. He had 9 months experience operating a scraper, track hoe, backhoe, front-end loader, and track loader.

Frank's application is dated March 19. Frank was referred by a newspaper ad. Frank sought employment as an operator or laborer at a negotiable salary. Frank's last wage rate was $19, and his highest rate was $21.50. He had prior experience as an operator, laborer, and finisher. He listed 4 years experience operating a backhoe, along with experience operating a bobcat, excavator, loader, and dozer.

Steve Dallas application is dated April 11. It states he is applying for a driver/operator position with a salary of $10.40 an hour, the rate he was earning at his prior employer. Included in the equipment Dallas said he could operate were front-end loaders, backhoes, and dozers. He listed 7 years experience as a mechanic and a welder, 3 years driving a tractor-trailer and he had class A CDL.

Ray's application is dated April 20. He applied for any position with no set salary rate. He was earning $13 at his last job, and his highest prior rate was $16.40. He had a class A CDL with experience driving a variety of trucks.

Klein's application is dated June 12. He applied for a laborer, operator, or driver position at a rate of $13 to $14 an hour. He was earning $13 at his last employer. He said he had a class B CDL, and he had 32 years experience operating a backhoe, dozer, grader, loader, forklift, tractor and cement truck. He listed 32 years experience as a mechanic, 25 years as a welder and painter, and 20 years as a truck driver.

Ludlow's application is dated July 9, and it states Jason Frank referred him. Ludlow applied for any position and his salary request was open. Ludlow's highest prior rate of pay was $14.50 as a pipe foreman. He also had experience as a pipe finisher and laborer. He said he could operate a backhoe, skid steer, rollers and dumps.

While Respondent listed Bufton with a February 2001 hire date, Peter Crone testified there was no work for him at that time, and Bufton did not actually start work until April or May 2001. Dewald testified as follows: Ray primarily performs laborer's work, although he operates heavy equipment on a seldom, but periodic basis; Klein is primarily a dump truck driver, who also operates a loader, which is heavy equipment, to load the dump truck; Harvey works as truck driver and an operator, spending half of his time performing each task; and Frank primarily does laborer's work, although he occasionally operates a forklift, which is operator's work.

4. The 2002 applications of union members

Carl Larson, a Local 17 organizer, applied for work at Respondent on April 15, 2002. Larson, wearing a Local 17 jacket, met P.J. Crone in Respondent's office and was given an

employment application.[16] Larson took the application outside to fill it out when he was approached by P.J. Crone who asked if Larson was serious about working there as an operator because Respondent was looking for someone. Larson replied he was serious.

Larson completed the application and gave it to P.J. Crone.[17] The application states the following: Larson was applying for any available position and his salary was negotiable. Larson listed an extended history of employment as an operator earning $25.41 an hour, plus benefits. Larson graduated from the Operating Engineers training school and had 15 years experience operating such equipment as a dozer, excavator, backhoe, crane, fork truck, loader, and boom truck. Larson's experience ranged from pipe line utility work to the erection of buildings, he had a class A CDL and experience driving a lowboy, dump truck and trailer. Larson had performed light carpentry work, roofing, concrete and flat work, and he had some welding experience. Larson listed Local 17 Organizer Franz as a reference.

On April 15, P. J. Crone introduced Larson to Peter Crone and the transcript of their conversation reveals the following: Peter Crone asked Larson if he was applying for an operator's position and he said he was. Larson told Peter Crone that he was a member of Local 17 for last 10 years, and he was on layoff since October. Larson told Peter Crone that he has a crane license, and he ran loaders, excavators, rubber-tired hoes, and small dozers. In response to Peter Crone's question, Larson said that he had experience digging around utilities. Larson said that he had a class A CDL and he had hauled equipment with a lowboy and a dump truck.

Peter Crone asked why Larson was not with the Union, and Larson said they do not have work. Peter Crone asked if Larson was still carrying a card, and he said he was. Peter Crone said Respondent is a non-union company and asked if the Union would be against Larson working there. Larson said he could ask the Union's permission, or if he had to, he might be willing to drop his book if Respondent required it. Peter Crone said the Union had been after Respondent to go union but Respondent is a non-union shop and would like to stay that way. He said Respondent did not have a problem hiring union operators. Peter Crone said he felt, based on recent experience, the Union would require Larson to drop his book. Peter Crone told Larson that, "We are looking for an operator, there's no question about it, and we would love to hire you but I would think you would probably have to give up the union…only because they would say so or they would have a problem with you working for a non-union firm and we don't want to personally get tied up with the union at this point."

Peter Crone told Larson that Respondent's work was a combination of commercial and prevailing wage work and that 50 to 75 percent of the work was prevailing wage work. Peter Crone went on to state, "I am very interested in you know talking to you further and eventually hiring you as an operator, but we have went through quite a bit of a problem with unnecessary,

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[16] Larson tape-recorded significant portions of his conversations with P.J. and Peter Crone, without their knowledge. A transcript of the tape was reviewed and corrected by the parties after they listened to the tape. The corrected transcript and the tape were thereafter stipulated into evidence, excluding those sections of the transcript, which were derived from Larson's personal notes as opposed to the recording of the actual conversations. The following findings are made based on the transcript of the tape, and for conversations that were not recorded on Larson's credited testimony. I found Larson, considering his demeanor, to be a credible witness. Moreover, much was his testimony was corroborated by the tape, admitted, or not denied by Respondent's officials.

[17] Larson's application is dated April 16, 2002. However, I have credited Larson's testimony that he applied on April 15, and unintentionally misdated the application.

what we think harassment from the union last year: and we did lose a couple of our good operators to the Union because we didn't want to become a union shop." Peter Crone said Respondent had worked as a sub on all union jobs where they have employed union laborers. He said that up until that time Respondent had not hired up to date union operators. He said, "Not that we're against it, we just don't feel our business is not all-union scale work …".

Larson asked what Respondent's scale was for commercial jobs and Peter Crone said as an operator probably $15 to $16 an hour. Larson asked Peter Crone if it was necessary for him to give up his union book. Peter Crone said it was not and Respondent did not want Larson to give up his book. Peter Crone said he did not know whether the Union would want Larson working for Respondent. Peter Crone said Respondent did not want to be a union shop, but they did not have a problem with union employees working for them. Larson said he just wanted to make sure this was not weighing in on Peter Crone's decision to hire him. Peter Crone replied, "No-no it's not. The only thing that's weighing on my decision is we don't want to have unnecessary situations, shall I say with the union, because of us hiring you." Peter Crone said, "And that's the only thing that weighs on my mind right at this point." Peter Crone said, "I'd love to have you work for us, to tell you the truth." Peter Crone suggested that Larson check with the Union as to his status if he were to accept work with a non-union contractor. Peter Crone said that, "We can use an operator too so if you want to check on that? And stop and get back to us, I'd appreciate it." Larson agreed to check with the Union, and Peter Crone said, "That will help us out a lot." Peter Crone said, "let's see if we can work something out."

Larson met Peter Crone at Respondent's office on April 19, 2002. The transcript of the conversation reveals Peter Crone asked Larson if he spoke with the Union. Larson responded they told him to do what he had to do. Peter Crone asked if Larson would have to pay union dues, and Larson responded he had already paid them for the year. Peter Crone said they were definitely looking for an operator, but they did not have work to put an operator to work until the following week. He said they had work that was on hold. Peter Crone said Respondent had a lot of jobs coming up, they are in pre-construction and a lot are being held up with paper work, or because it was wet in a particular area. During the conversation, Larson told Peter Crone that Larson could run a hoe, excavator, loader, and small dozer. He said he had a class A CDL and could drive a lowboy truck. Peter Crone said that they were looking for someone who had worked around utilities as a hoe operator. Larson said that he had performed this type of work. When Peter Crone asked Larson's desired salary on commercial jobs he replied they talked about $15 to $16 an hour, and Larson said he thought he was worth at least that amount. Peter Crone said he did not doubt it. Peter Crone said Respondent was "at a lull right now we don't have enough equipment in the right places, I don't know if you can hold out for another week or two? Till our jobs pick up?" Peter Crone said, "I think we would like to definitely give this a try. I am very concerned about with the union, has done as far as last year, (inaudible) and there's a lot of guys out of work." When Larson asked what the Union had done, Peter Crone replied, "Well what it basically was promoting the union, they were promoting the union. They did take some of our quality employees, we lost our good equipment operators." Peter Crone said these employees were not welcome back because Respondent wanted 2-week's notice, and these employees had been with Respondent for a long time. Peter Crone asked Larson to give them a little more time as they had some jobs coming up including school work digging foundations. Peter Crone said they would stay in touch and to be patient.

Union Organizer Franz applied again at Respondent's office on April 23, 2002, along with the following union applicants: Boyd, Catras, Angela Lambert, Jimmy Minter, Tom

Kaszubowski, James Erhardt, Weslie Kless, and Gary Senozetnik.[18] Franz and some of the other applicants were wearing union attire. Franz said to P.J. Crone they were there to apply for jobs and asked P.J. Crone if his application was still on file or if he had to fill out a new application. P.J. Crone said that if they are on file, they are good forever. P.J. Crone looked for and brought back Franz, Boyd, and Catras' 2001 applications. All of the named applicants, except Boyd, Catras, and Franz, completed and filed applications on April 23. P.J. Crone said that business was slow and that they were not hiring at the time. The following is a summary of the alleged discriminatees' applications produced from Respondent's files:

Earhardt applied for any position and at any salary. He said he completed the Operating Engineers apprenticeship program and he had 16 years experience operating a loader, dozer, excavator, crane, and forklift. He had a class A CDL with 6 years experience driving a dump truck. Earhardt's last hourly rate for prior employment was $24.50.

Kaszubowski applied to be an operator stating his salary request was open. He listed Local 17 for a reference. Salary listed for prior employment was prevailing rate as an operator. He said he had a class A CDL and 10 years experience in operating "all dirt equipment," black top rollers and cranes.

Kless applied to be an operator stating his salary request was open. He listed his last wage rate at $25.41 an hour. He named Local 17 officials as a reference. He said he had a class B CDL, and 14 years experience operating a dozer, excavator, and scraper.

Lambert applied to be an operator stating her salary request was open. She said she completed Local 17's training school. She listed her last wage as $40.07. Lambert said she had a CDL, and had 5 years of experience operating "backhoes, cranes, loaders, dozers, etc." She said she had 2 years driving experience flat bed trucks and cranes.

Minter applied for the position of operator/laborer with his salary request as open. He said he was employed as a union organizer and listed current and prior wage rates at $40.07, including fringe benefits. He listed 8 years experience operating excavators, backhoes, rollers, cranes, dozers, and forklifts, as well as experience as a mechanic, welder, and a truck driver with a class B CDL.

Senozetnik applied to be an operator with his salary request as open. He listed union officials as a reference. He listed his last wage at $25.41, and said he had 13 years experience operating a backhoe, loader, roller, and that he had a Class B CDL.

Larson's testimony reveals he called Respondent on April 29, and spoke to P.J. Crone. Larson asked how things were looking for work and if it was necessary to update his application. P.J. Crone said no that they keep them on file forever. Larson went to Respondent's office on May 3, and left a note for P.J. Crone stating he was still looking for a job. On May 16, Larson called Respondent and spoke to P.J. Crone. Larson taped this conversation. He asked P.J. Crone what was happening with the job. P.J. Crone said Respondent did not even have all their

[18] While Kless and Lambert's applications are dated April 22, I have credited Franz' testimony that they applied on April 23 and just misdated their applications, which were maintained in Respondent's files. Respondent did not dispute Franz' assertion that all the union applicants applied on April 23. I have also credited Franz' testimony that Boyd and Catras accompanied him to reapply on April 23. For, Franz recollection was specific and undisputed that P.J. Crone showed Boyd, Catras, and himself their applications on that date.

men back with the weather, and they were not real busy. Larson asked P.J. Crone to keep him in mind, and the response was Larson's application was on top if they got anything.

5. Respondent's hiring in 2002

The parties stipulated Respondent hired the following individuals in 2002 on the dates and to the positions set forth next to their names: Chad Phinney, April 8, laborer; Lewis Dallas, April 22, mechanic; Christopher Oakes, April 29, laborer; and Russell Delahoy, June 3, laborer. Their employment applications, except for Phinney's, were all filed in 2002 and are summarized as follows:

Phinney's application is dated April 16, 2001, and states Clate Bowen referred him.[19] He sought the position of operator/laborer. No salary was specified. The application shows that Phinney completed one year of trade school for welding and heavy equipment operation. He listed 6 months experience as a welder and fabricator, and a little over a year's experience as an operator-laborer. Phinney's highest prior wage rate was $10.50 an hour. He failed to list any specialized experience as an equipment operator on his application.[20]

Oakes' application is dated March 20. It states employee Joe Boyles referred him. Oakes sought employment as a laborer with his salary negotiable. He had attended the Buffalo Tractor Trailer Institute and had driven a tractor-trailer in driving class. There is a note on the application which reads has CDL, would hire. Oakes was earning $12.54 at his last employer. He said he had 9 years experience operating a forklift, and 5 years operating a front-end loader, bucket tractor, skidster, and box scraper. .

Lewis Dallas' application is dated April 17. It states that his son Steven Dallas works for the company. Lewis Dallas applied to be a mechanic. His salary was left open. Lewis Dallas' application showed he had worked from 1967 to 2001 as a mechanic and supervisor. He was earning $626 a week, or $15.65 an hour based on a 40- hour week. He had a class B CDL, and listed no experience as a laborer or in operating heavy equipment.

Russell Delahoy's application is dated May 16. It states employee Kim Delahoy, a current employee, referred him. He sought the position of a concrete worker at a rate of $9 to $10 an hour. He listed four prior positions where he was employed as a laborer, with his highest rate of pay as $12.20. He listed no experience in operating heavy equipment, but stated he had a background in working with concrete. He stated he left one of his prior employers because it "went union."[21]

Peter Crone testified that Oakes was hired as a laborer and he only worked for a few

[19] Bowen's status is not identified on the record, although Respondent argues in its post-hearing brief that a contractor referred Phinney.

[20] Phinney applied in 2000 and again in 2001, but was not hired until 2002. Phinney visited Respondent's office in 2002 and indicated he was still interested in working for Respondent. Phinney testified when Phil Crone hired him he asked Phinney if he was interested in the Union and Phinney said no. Considering his demeanor, I have found Phinney to be a credible witness. There is no allegation this questioning is unlawful in the complaint.

[21] Peter Crone testified Russell Delahoy was on layoff at the time of the hearing, but was scheduled to be recalled when the new season starts.

days then quit and was not replaced. He testified that he was not aware of Oakes performing any operator's work for Respondent, but it would not have surprised him if Oakes had done so. Phinney testified he had only seen Oakes perform laborers work, although Oakes had told Phinney that he had performed some operator's work. Phinney testified that Oakes quit in July 2002. Peter Crone testified Lewis Dallas was hired as a mechanic at the recommendation of Steve Dallas, Respondent's prior mechanic, when Steve Dallas took the position as truck driver.

Peter Crone testified Respondent hired several other employees in 2002, in addition to those stipulated above. Malcolm Metzler was hired as a lowboy driver around July 2002. Metzler was recommended by Joseph Boyles, who previously held that position and who had been in business with Metzler as over the road drivers. Respondent entered into evidence an employment application filed by Metzler dated June 21, 2001. The application states Metzler sought employment as a driver or an operator and that Boyles referred him. He did not list a desired salary, and his past employment was mainly that of a truck driver where he was paid a percentage of the load, or a fee for mileage. He said he could operate oil field equipment, large forklifts, and cherry pickers. Metzler said he had 20 years experience as truck driver and as a mechanic. Metzler had a Class A CDL.

Peter Crone testified Mark Lewis was the only operator Respondent hired in 2002. Lewis was a prior employee, who had worked for Respondent for many years before moving to Florida. Peter Crone testified, prior to his return to Respondent's employ in 2002, Lewis had been in touch with Respondent for the past 5 years about coming back to work. A couple of months prior to the December 2002 hearing, Lewis decided to make the move back and return to work, and Respondent rehired him.[22]

Peter Crone testified Daniel Kruszynski and Mike Knowles were hired around August 2002 for a short-term basis as laborers.[23] At the time of the December 2002 hearing, Knowles was still employed with Respondent but was on layoff for a week due to weather. Kruszynski worked for 4 to 6 weeks and then was laid off for the season. Peter Crone testified if Kruszynski is looking for a job at the end of the winter season and Respondent needed laborers they would take him back. Peter Crone testified Kruszynski was hired when he responded to a newspaper ad. He testified Respondent hired these individuals because it had a labor-intensive job requiring planting trees and building rock retaining walls, and the employees were only needed for a short time. He testified most of the applications on file were people looking for full-time positions or other employers had hired them when they were contacted. He testified Kruszynski had landscaping and carpentry experience, and was seeking part time work.

Peter Crone testified that Leo Owens has worked for Respondent on and off for about 5 or 6 years as an operator on an as needed basis. Owens worked for Respondent for 4 to 6 weeks in 2001, and for a month during the winter of 2002.[24] Peter Crone explained that if an employee does not have skills to remain working for Respondent during the winter months, they are placed on temporary layoff. Peter Crone testified Doug Cleveland has worked for Respondent periodically for the last 12 years as an operator. He worked for Respondent a week in October 2002. Peter Crone testified Cleveland also worked for Respondent in 2001. Similarly, he testified Kathleen Fisk has worked for Respondent periodically for the past 6 to 8 years as a laborer and she has performed janitorial work. She worked for Respondent for about

[22] Phinney testified Lewis told him he had left Respondent for almost 10 years.

[23] Phinney also testified that Kruszynski and Knowles worked as laborers.

[24] The parties stipulated that Owens worked for Respondent in 2000 and 2001 and Dewald testified Owens was an operator, who would come and go with the company.

4 to 6 weeks in 2002.

In addition to the applications of the alleged discriminatees, Respondent entered in to evidence 23 applications filed in the year 2002, and 16 applications filed in 2001, for which the parties stipulated that the applicants were not hired or interviewed.[25] Applications for Respondent employees Lewis, Knowles, Kruszynski, Owens, Cleveland, and Fisk were not entered into evidence.

C. Analysis and conclusions

In *Wayne Erecting, Inc.,* 333 NLRB No. 149 (2001), the Board citing *FES,* 331 NLRB 9 (2000), set forth the following framework to analyze refusal-to-consider and refusal-to-hire allegations. The Board stated in *Wayne Erecting, Inc.,* supra, slip op. at 1 that:

> In order to establish a discriminatory refusal-to-consider violation under *FES* the General Counsel must show:
>
> (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment.
>
> In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish the following elements:
>
> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation. (Citations omitted.)

In *FES,* supra, at 14, the Board stated that "in cases involving numerous applicants, the General Counsel need only show that one applicant was discriminated against to establish a refusal-to-hire violation warranting a cease-and-desist order. If the General Counsel seeks an affirmative backpay and reinstatement order, he must show that there were openings for the applicants." The Board went on to state, "Where the number of applicants exceeds the number of available jobs," a "compliance proceeding may be used to determine which of the applicants would have been hired for the openings."[26]

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[25] Respondent actually tendered 17 applications for the year 2001. However, Metzler's application was included in this group, and he was in fact hired in 2002.

[26] Counsel for the General Counsel asserts in her brief that Respondent hired nine employees in 2002 in slots for which the alleged discriminatees were eligible to be hired. It is asserted that, prior to the hearing, Respondent informed the Region that: Delahoy, Oakes, Lewis Dallas, and Phinney were hired, and that, during the hearing, it was discovered that Knowles, Metzler, Kruszynski, Cleveland, and Owens were also hired. It was also discovered at the hearing that Respondent hired Lewis in an operator position in the fall of 2002. I find the parties fully litigated and addressed in their briefs whether the union applicants should have been hired in all 10 slots, including the one occupied by Lewis.

On March 11 and 12, 2001, Respondent ran an ad in the Buffalo News for laborers and equipment operators. On March 12, union member Saviano filled out an application at Respondent's office stating he had made "union scale" during prior employment. On March 13, Union Organizer Franz, along with eight union members, applied for work at Respondent. Several of the applicants wore union attire and their applications further identified their union status labeling some as volunteer or paid organizers. Respondent agent P.J. Crone informed Franz that the applications were good forever. Saviano and all of the March 13 applicants set forth in their applications extensive experience operating heavy equipment, as well as varied experience in the construction industry. Four of the ten applicants applied for operators or laborers positions, and a fifth applied for any position. The remaining applicants applied for an operator position. Seven of the applicants said they had trucking experience, a class A CDL, or both. Three of the applicants said they had mechanic's experience. None of the union applicants were hired.

Respondent hired one operator, three laborers, two truck drivers, and one truck driver/ mechanic in 2001, all of whom began working after the union applicants applied. These employees were hired more than 6 months before the filing of the unfair labor practice charge, and therefore outside the Section 10(b) limitations period of the Act for finding a violation for the failure to hire the union applicants. However, I have considered Respondent's actions in 2001 as background evidence for its conduct occurring within the statutory limitations period in 2002. For it has long been held that events prior to the 6 months' statute of limitations may be used as background to shed light on a respondent's motivation for conduct within the 10(b) period. See, *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411, 416-417 (1960); *Grimmway Farms,* 314 NLRB 73, 74 (1994) enf. denied in part on other grounds 85 F.3d 637, 157 LRRM 2064 (9th Cir. 1996)(where the Board considered a work stoppage outside the 10(b) period as background evidence for a respondent's refusal to rehire employees);[27] and *Douglas Aircraft Co.,* 307 NLRB 536, fn. 2 (1992) enfd. 66 F.3d 336 (9th Cir. 1995)(where it was held that discipline outside the 10(b) period could be considered as evidence of animus to evaluate a discharge within the 10(b) period). Similarly, statements occurring outside the 10(b) period that would constitute violations of Section 8(a)(1) of the Act may be used as evidence of animus to shed light on a respondent's conduct within the 10(b) period. See, *Wilmington Fabricators, Inc,* 332 NLRB No. 2, slip op. at 4, fn. 6 (2000) and *Kaumograph Corp.,* 316 NLRB 793, 794 (1995).

Shortly after the union applicants applied in March 2001, Respondent Owner Phil Crone told then employees Dewald and Bowen that Respondent did not want to get involved with any unions, especially the Operators, that Respondent would never sign a contract, and that Respondent would probably close the business before getting involved with the Union. In a separate conversation, during this time period Phil Crone told then employee White that before he would sign with the Union he would shut the doors to the place. These statements constitute threats of business closure and as well as statements that selecting union representation would be futile and the Board has routinely held that such statements constitute independent violations of Section 8(a)(1) of the Act. See, *Hausner Hard-Chrome of Ky., Inc.,* 326 NLRB 426, 433 (1998). These statements, occurring outside the Section 10(b) limitations period, constitute evidence of unlawful animus on the part of Respondent.

Following his conversation with Phil Crone, Dewald met with Peter Crone, who had with

[27] In *Grimmway* the court in a nonpublished decision did not reject the Board's Section 10(b) theory. Rather, the court found, contrary to the Board, that the employees were told that they would not be rehired outside the 10(b) period.

him the recently filed applications of the Local 17 members. Peter Crone asked Dewald, a known union adherent, if the Union expected Respondent to hire these applicants. Peter Crone's remark constituted a signal to Dewald that it was not Respondent's intent to take the union members' applications seriously and statements such as these have been found to violate Section 8(a)(1) of the Act. See, *Colden Hills, Inc.,* 337 NLRB No. 86 (2002). Peter Crone said Respondent would not be interested in a union, and that they would close the business before they got involved with any. During this conversation, or during other conversations during this time period, Peter Crone told Dewald that Respondent would not be competitive, and would not stay in business if it had to pay union rates. Predictions such these, which when made are not premised or conveyed on the basis of objective fact, have been found to violate Section 8(a)(1) of the Act. See, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969); *Hausner Hard-Chrome of Ky., Inc.,* supra. at 433; *IPLLI, INC.,* 321 NLRB 463 (1996); and *Overnite Transportation Co.,* 296 NLRB 669, 670 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).[28] The statements on the part of Respondent's owners to employees in the spring of 2001, coming on the heels of the union members applications and in part referencing these applicants, demonstrate strong animus towards and a bias against hiring the union members because of their union affiliation.

Respondent's animus towards the hiring of union applicants continued into the year 2002. Phil Crone hired Phinney on April 8, 2002. Phinney's credited testimony is that, when Phil Crone hired him, Phil Crone asked Phinney if he was interested in the union, to which Phinney answered no. Such questioning of applicants, during the interview process, has long been held by the Board to be coercive interrogation. See, *Godsell Contracting,* 320 NLRB 871, 873 (1996).[29] While this interrogation was not alleged as a violation of the Act in the complaint, it serves to constitute evidence of animus on the part of Respondent. See, *Stoody Co.,* 312 NLRB 1175, 1182 (1993), where unalleged interrogations were relied on as evidence of animus; and *Meritor Automotive, Inc.,* 328 NLRB 813, 813 (1999), holding that, "It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful."

On April 15, 2002, Local 17 Organizer Larson went to Respondent's facility to apply for work. Larson did not reveal his employment with the Union. However, he wore union attire, listed union related credentials on his application, and told Peter Crone that he had been a member of Local 17 for the last 10 years. I find that Peter Crone violated Section 8(a)(1) of the Act when, during their meeting on April 15, he told Larson Respondent did not want to become a union shop and then went on to state that the only thing weighing on his decision to hire Larson "is we don't want to have unnecessary situations, shall I say with the union, because of

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[28] The fact that Union Organizer Peterson presented Respondent with a contract offer it found unacceptable does not excuse Peter Crone's threats to close it facility if the employees obtained union representation and Respondent had to pay union rates. When Peterson presented a contract proposal to Respondent, the Union was not the employees' majority representative and neither side had an obligation to engage in the give and take in negotiations required to bargain in good faith. Moreover, Peter Crone failed to provide to Respondent's employees any objective basis for his predictions of closure if Respondent had to pay union rates. I also do not find the fact that Respondent took no action against three former employees who were known union supporters to negate the animus its owners demonstrated towards the Union or the union applicants. There was no evidence that Respondent's officials were aware that its employees attempted to organize Respondent, while the union applicants applied en masse with attached documentation showing an intent to organize Respondent's work force.

[29] There was no suggestion on the record that Phinney was an open union supporter or otherwise aligned with the Union when he was questioned by Phil Crone.

us hiring you." Similarly, I find Peter Crone violated Section 8(a)(1) of the Act, during their meeting of April 19, when he told Larson as to his chances of hire that, "I think that we would like to definitely give this a try. I am very concerned about with the union, has done as far as last year…". When Larson asked what the Union had done, Peter Crone replied, "Well what it basically was promoting the union, they were promoting the union. They did take some of our quality employees, we lost our good equipment operators." I find Peter Crone's remarks to Larson were coercive and violative Section 8(a)(1) of the Act in that they served to demonstrate Respondent's dissatisfaction with the union in combination with Larson's union affiliation impacted negatively on Larson's possible employment with Respondent. See, *Standard Sheet Metal, Inc.,* 326 NLRB 411, 420-421 (1998); *Ristorante Donatello,* 314 NLRB 693, 695 (1994); and *Ogden Mechanical Contractors,* 336 NLRB No. 87 (2001), slip op. at 5.

On April 23, 2002, Franz, along with nine open union members sought employment with Respondent. Franz and applicants Boyd and Catras were told by P.J. Crone their 2001 applications remained on file and it was not necessary for them to reapply. The six other union members filled out and filed applications with Respondent on that date. Of the nine union applicants who applied for work on April 23, six applied for an operator position, two applied for an operator or laborer position, and one applied for any position.[30] All nine listed extensive experience operating heavy equipment and each stated they had a class A or B CDL, or had trucking experience. One of the applicants listed experience as a mechanic. Larson, the tenth union member to apply in 2002, said in his application he was applying for any position, and he had a class A CDL with driving experience. Respondent hired a laborer on April 8, 2002, a mechanic on April 22, and then hired four laborers, a truck driver, and an operator after the union members applied on April 23, and it recalled two other operators who it employed on a seasonal basis. None of the union applicants who applied in 2001 or 2002 were hired.

I find the General Counsel has established both a prima facie case of an unlawful refusal to consider for hire and refusal to hire for the positions Respondent filled in 2002. Union applicants applied en masse in 2001 for employment with Respondent in response to a recent newspaper ad. They tendered with their applications letters signifying an intent to organize Respondent's employees. Shortly thereafter, Respondent's owners reacted by telling current employees Respondent was non-union and would probably close before getting involved with a union. One employee was asked whether the union applicants expected Respondent to hire them. The union applicants listed extensive experience on their resumes in a variety of areas including as operators, truck drivers, and some showing experience as mechanics and sought positions as operators with some seeking positions as operators or laborers, and one seeking any position. Respondent hired employees after they applied in positions for which they were qualified, yet none were hired. Similarly, three of the union applicants who applied in 2001, as well as seven new union applicants, including Larson applied in April 2002. The 2002 union applicants again listed extensive operator and trucking qualifications in their applications. In addition to applying for positions as operators, two applied an operator or laborer position, and two applied for any position, and one had experience as a mechanic. Respondent continued to hire in 2002, and although the union applicants in 2001 were told that their applications were good forever, none of the union applicants who applied in 2001 or 2002, were ever hired. Respondent's owners continued to make statements in 2002 showing they harbored animus toward the union applicants.

I find that applicants with operator experience were qualified to perform less skilled work

[30] Boyd and Catras applications indicated that they were applying for an operator position, Franz had applied for an operator or laborer position.

as laborers, as Peter Crone testified operators at Respondent are routinely required to perform laborer's work and vice-versa. Moreover, Respondent's officials considered the experience and versatility the union applicants displayed on their applications to be an asset. For Peter Crone told former employee White when he was hired Respondent wanted an employee who could operate equipment, work as a laborer, lay pipe, and drive a truck. Yet, many of the employees hired in 2001 and 2002, had less experience and versatility than the union applicants.

I find Respondent excluded the union applicants from its hiring process and antiunion animus contributed to the decision not to consider these applicants. I also conclude that: Respondent was hiring or had concrete plans to hire at the time the applicants applied; the applicants had experience and training relevant to the positions Respondent filled; and antiunion animus contributed to the decision not to hire the applicants. Therefore, the burden shifts to Respondent to establish it would not have considered or hired the applicants in the absence of their union activity or affiliation. See, *FES,* supra. I find the complaint allegations concerning the union applicants who applied in 2001 are not time barred for consideration for positions Respondent filled in 2002, since P.J. Crone told them their applications were good forever when they applied in 2001. This statement was reaffirmed when Franz, Boyd and Catras returned to Respondent's office in April 2002, and P.J. Crone showed them their applications remained on file, and repeated they need not reapply.[31] The Board has held, in similar circumstances where applicants are told their applications are on file and do not need to be updated and where they have never been expressly denied employment, that applications filed outside the Section 10(b) period remain active for positions subsequently filled for which an unfair labor practice charge is timely filed. See, *Nelson Electric Contracting Corp.,* 332 NLRB No. 17, slip op. at 1, fn. 3 (2000) enfd. 171 LRRM 2512 (2nd Cir. 2002); and *Great Lakes Chemical Corp.,* 298 NLRB 615, fn. 2 (1990) enfd. 967 F.2d 624 (D.C. Cir. 1992).

I find that when Larson applied on April 15, 2002, Respondent had concrete plans to hire an operator and would have hired Larson at that time, absent his union affiliation. In this regard, P.J. Crone told Larson Respondent needed an operator. During an interview on that date, after discussing Larson's qualifications, Peter Crone also told Larson Respondent needed an operator, and stated, "we would love to hire you…". Peter Crone told Larson the only thing weighing on his mind was that he did not want to have unnecessary situations with the union because of hiring Larson. Larson returned on April 19, and Peter Crone told Larson Respondent was looking for an operator but did not have work until the following week. He said Respondent had a lot of jobs coming up that were being held up for paper work or because a particular area was wet. During the conversation, Peter Crone asked Larson his desired wage rate for commercial work and Larson stated they had talked about $15 to $16 an hour. Peter Crone said he thought Larson deserved that wage rate. Peter Crone said he would like to give this a try, and asked if Larson could hold out for another week or two. However, Peter Crone said he was very concerned about what the union had done last year in promoting the union and taking some of Respondent's quality employees. On April 23, Union Organizer Franz, who Larson listed as a reference on his application, applied for work at Respondent with eight union members. Despite repeated contacts thereafter by Larson, Respondent never hired him.

I find Respondent exhibited a fixed intent in its conversations with Larson to hire Larson as an operator, but failed to do so because of concerns related to his union affiliation. These concerns came to fruition when a Franz and a large number of union members applied for work

[31] P.J. Crone gave Larson similar assurances telling him that there was no need to update his application in that Respondent kept them on file forever. Respondent also hired Phinney in 2002 based on an application filed in 2001.

on April 23. I find the reasons advanced for Respondent's refusal to hire Larson have shifted over time and are pretextual. In a prehearing position statement filed by Respondent's counsel it was stated Larson was told if a position became available in Larson's area of interest, Respondent would consider him for employment. It was stated in the position statement Larson said he was mainly interested in operating a crane and Respondent does not use crane operators. However, after it was disclosed at the hearing that Larson taped his conversations with Peter Crone, which revealed Larson repeatedly told Peter Crone that he had experience operating a variety of equipment and he had a Class A CDL, Peter Crone testified there was no concern over Larson's qualifications. Rather, Peter Crone testified Respondent failed to hire Larson because several expected jobs did not materialize or were postponed. Shifting defenses have been long held by the Board to signify the proffered reason for an action is pretextual. See, *Black Entertainment Television,* 324 NLRB 1161 (1997), where the Board, in part, relied on vacillating positions set forth in a pre-hearing position statement and representations made at the hearing to reject the respondent's defenses and find its conduct unlawful. See also, *Vincent M. Ippolito, Inc.,* 313 NLRB 715, 724 (1994).

I do not find Respondent's failure to hire an operator immediately following Larson's application until it hired Lewis in the fall of 2002 serves to defeat the conclusion Respondent would have hired Larson at the time of his April 2002 application, absent Larson's union affiliation. The evidence reveals Respondent employed employees with multiple skills, and Peter Crone testified Respondent's operators spent a portion of their time performing laborer's work, and that laborers also performed operators' work. In fact, Phinney, although hired as laborer shortly before Larson applied, credibly testified he spent 50 percent of his time performing operators' work, an amount which Peter Crone's testimony reveals was unusual for a laborer. In other words, Respondent had the ability to shift operators' work to other employees rather than hire union member Larson as an operator as he had been promised.[32] The Board has held that a discriminatory refusal to hire can be established when a respondent delays in filling a position in order to avoid hiring a union applicant. See, *FES,* supra, at 12, fn. 7; and *V.R.D. Decorating,* 322 NLRB 546, 551-552 (1996).

Respondent also treated Larson in a disparate fashion to the manner it treated non-union applicant Bufton in 2001. Bufton applied for work as an operator on February 15, 2001 but did not actually begin working for Respondent until April or May 2001. Bufton did not list a desired salary and showed no salary history on his application. He also failed to list dates of prior employment on his application or the amount of experience he had operating equipment, or for other skills he listed on his application. Respondent ran an ad for laborers and equipment operators on March 12, 2001, to which 10 union applicants who were qualified for operator positions submitted applications, which contained much greater detail than the application submitted by Bufton. However, Peter Crone explained he hired Bufton in lieu of the union applicants because Bufton had been promised a job in February when he applied. In contrast, Larson was told that Peter Crone would love to hire him, and he needed to be patient because Respondent was waiting for some jobs to come through. However, Larson, whose union affiliation raised red flags to Respondent, was never hired. Rather, Respondent hired Lewis in the fall of 2002 as an operator, and in the interim had Phinney who was hired as a laborer

[32] Respondent continued to add to its work force without hiring Larson. Respondent hired a laborer on April 29, a laborer on June 3, and two more laborers in August 2002. While Peter Crone testified that the laborer hired on April 29 only worked a couple of days then quit, Phinney testified this individual worked through July 2002. Regardless of the time this individual worked there, he left on his own volition and Respondent did not lay him off for lack of work.

perform an extensive amount of operator's work.[33] Respondent failed to submit Lewis' employment application into evidence for a comparison of his skills relative to Larson and the other union applicants, and I have concluded Respondent has failed to establish it would not have hired Larson, absent his union affiliation. Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire Larson as an operator when he applied in April 2002, because the statements of Respondent's officials reveal Respondent had concrete plans to hire an operator and would have hired Larson, absent his union membership.[34]

Concerning the other union applicants, Peter Crone testified recruiting sources include questioning current employees, references from contractors, and as a last resort advertising. Peter Crone testified he relies on the following factors in deciding whether to interview an applicant: experience, desired rate of pay, and the distance the applicant lives from Respondent's facility.[35] He testified that Respondent is more likely to hire applicants, who in the past, have been employed for lengthy periods of time because they want to hire people as full time employees who will return to Respondent's employ season after season. Peter Crone testified if someone had a desired rate of pay considerably higher than what Respondent is able to afford, they usually set those applications aside for possible further review.

Respondent asserts, in its post-hearing brief, a prime consideration in whether to hire an applicant is if a current employee or a competitor recommends them. Other factors include experience, desired rate of pay, geographic location and continuity of past work. Respondent contends in the spring of 2002, Respondent hired no new operators. At that time, it hired three laborers, Phinney on April 8, Oakes on April 29, and Russell Delahoy on June 3. Phinney applied in 2000, again in 2001, and came in again in 2002 when he was hired as a laborer at $10 an hour. Oakes was hired for a short time, quit, and was not replaced. Russell Delahoy was hired because his brother, who had worked for Respondent for several years as an operator, recommended him. Respondent hired Lewis Dallas, as a mechanic in 2002. He is the father of the prior mechanic, and he had 34 years experience as a mechanic. It is stated that none of the alleged discriminatees sought work as a mechanic. Respondent placed an ad for laborers and pipe layers in August 2002 due to the need for employees for a short period for a labor intensive job. At that time, Respondent hired two laborers Kruszynski and Knowles on a short time basis to perform landscaping and planting work in response to the ad. Respondent hired Lewis as an operator in the fall of 2002. He had previously worked for Respondent for at least 15 to 16 years, moved away, and then indicated a desire to return to work. Concerning the other employees hired by Respondent in 2002, Metzger was hired as a lowboy driver, and was recommended by the prior lowboy driver. Metzger has a class A CDL, and no alleged discriminatee applied for any such position. Owen and Cleveland had a prior employment history with Respondent. Respondent contends that most of the alleged discriminatees applied

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[33] Lewis was a prior employee whose employment was severed for 5 to 10 years with Respondent when he quit and moved out of state.

[34] I do not credit Peter Crone's self-serving declaration that Respondent did not hire Larson because expected work did not come through. Respondent submitted no documentary evidence to support this testimony and as set forth above Respondent's defense has shifted concerning Larson further supporting the conclusion that it is pretextual. Moreover, Peter Crone told Larson that some areas were wet and some equipment had to be moved before they could hire him signaling that Respondent had the work, and that there would only temporary delays to Larson's instatement, which was confirmed by his telling Larson that Respondent needed an operator, would love to hire him and to be patient.

[35] However, Peter Crone testified a long commute does not bar an applicant from consideration. Rather, it is up to the applicant to decide whether to make the commute.

for only operator positions or if they sought general employment, were interested in receiving operator's wages or had a prevailing wage history. However, Respondent's rate for operators for commercial work was a maximum of $17 an hour. The applications of the employees hired clearly indicate they were interested in laborers' work, their salary was negotiable, and their prior employment history showed they fit within Respondent's salary range for laborers.

I do not find Respondent's hiring criteria is as precise as Respondent attempts to portray it. First, while Peter Crone testified Respondent had a policy of destroying applications at the end of each calendar year, the credited evidence reveals P.J. Crone told the union applicants Respondent maintains applications forever. In fact, Respondent had the 2001 applications on file at the time of the hearing in December 2002. Moreover, Peter Crone testified he and his brother Phil Crone each hired some of the employees in 2002, and that he did not know if his brother reviewed the 2001 applications before deciding which employees to hire. The obvious conclusion is Phil Crone, who did not testify, may have used a different hiring process from the one described by his brother.

I find Respondent's contention that it restricts its hiring to applicants with a wage request or history in line with what it pays its employees for commercial work to be pretextual. This alleged practice did not enter the picture when Peter Crone interviewed Larson. Peter Crone testified that the most Respondent pays an operator for commercial work is $17 an hour. However, Larson, during his interview told Peter Crone that he had been a union member for 10 years, and Larson's application showed he had an extended employment history of earning $24.41 an hour, plus benefits as a union operator. Yet, at one point during his interview, Peter Crone told Larson that Respondent would love to hire him. Moreover, the subsequent reasons advanced for not hiring Larson, that Larson's main experience was that of a crane operator, or that certain expected work did not come through had nothing to do with Larson's wage history, which was similar to that of the other union applicants. Respondent's commercial laborer's rate topped out at $13 an hour, according to Peter Crone. Yet, Respondent hired non-union applicant Jason Frank as a laborer in 2001 and Frank's application reveals he earned $19 an hour at his last employer, and his highest prior wage rate was $21 an hour. Concerning the union applicants, 14 of the 17 said or indicated on their applications that their desired wage rate was open or negotiable, and two of those individuals placed no prior wage history on their applications.[36] The Board has held that, in certain circumstances, an employer can legitimately refuse to hire someone who would take a substantial pay cut. See, *7UP of Cincinnati,* 337 NLRB No. 80 (2002). However, this defense will be rejected where other factors such as evidence of union animus, or disparate treatment reveal that it is pretextual. See, *Colden Hills, Inc.,* 337 NLRB No. 86 (2002); *Boydston Electric,* 331 NLRB 1450, 1454 (2000); *Donald A. Pusey, Inc.,* 327 NLRB 140 (1998); and *Norman King Electric,* 324 NLRB 1077, 1085 (1997) enfd. 177 F.3d 430 (6th Cir. 1999).[37] Respondent's continually shifting defenses further

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[36] Respondent hired non-union applicant Bufton although he listed no desired wage or wage history on his application revealing that how an employee filled out an application did not create the same bar for employment for non-union applicants. Respondent did not enter into evidence the wage history of successful non-union applicants Lewis, Kruszynski, and Knowles.

[37] The instant case is distinguishable from *J.O. Mory, Inc.,* 326 NLRB 604 (1998), where a single departure from an employer's policy against hiring high wage applicants was not sufficient to undermine the policy before the Board. In *J.O. Mory, Inc.,* the Board specifically found that there was no independent evidence of animus toward the union, and the employer had a much higher annual hiring rate than the Respondent here thereby minimizing the significance of one departure from its policy. Moreover, the employer in *J.O. Mory, Inc.,* had a history of hiring union applicants who conformed to its wage policy. Since I have concluded that

Continued

substantiates the pretextual nature of its claims. Respondent first argued that it did not hire Larson because it had no need for a crane operator, it later contended that Larson's skills were fine but expected work did not come through. However, it contended that it did not hire the other union applicant's because of their history of high earnings, although their salary history was the same as Larson's.

While Respondent, on occasion, hires employees referred by current employees, the evidence does not bare out its claims that this is an exclusive or even preferential source of recruitment. In fact, the employment applications of the seven individuals, who Respondent hired in 2001, reveal that a current employee referred only one of the seven. Moreover, Ludlow, the only successful applicant hired in 2001 based on the referral of a current employee, states in his application he was referred by Jason Frank. However, Frank began working on April 9, 2001, and Ludlow started on July 16. Respondent was certainly not relying on a lengthy track record by Frank when it accepted his recommendation to hire Ludlow.[38] Respondent ran newspaper ads seeking applicants in both 2001 and 2002, and Dewald's testimony and Respondent's past practice indicates that it regularly hired individuals, who walked in off the street. In this regard, Peter Crone told Larson, who was not referred by anyone, that Respondent would love to hire him.[39] See, *Nelson Electrical Contracting Corp.* 332 NLRB No. 17, slip op. at 2, (2000), enfd. 171 LRRM 2512 (2nd Cir. 2002), where the Board rejected a respondent's defense that it chose to rely on transfers of its current employees from other projects, former employees, or "positive referrals from other sources," as sources for new hires where it departed from the policy when it advertised for employees, hired individuals who were not former employees, and hired without positive referrals.

Peter Crone testified Respondent hired Kruszynski and Knowles as laborers for a short-term basis because Respondent had a labor intensive project involving landscaping work in the fall of 2002.[40] I do not credit Peter Crone's explanation for hiring Kruszynski and Knowles in lieu of the union applicants. He testified that Kruszynski and Knowles responded to a newspaper ad Respondent ran on August 25, 2002. While they may have been assigned to perform some landscaping work, this assignment did not match the requirements of the newspaper ad, which was seeking laborers, pipe layers, and people with a general knowledge of concrete work. Moreover, while Peter Crone testified that these individuals were hired for a short-term basis, one was still employed at the time of the hearing in December 2002, and the other was on seasonal layoff, with the possibility of recall when work picked up in the spring.

Respondent's assertion of a wage bar as a defense to its hiring union applicants is pretextual, I need not reach the issue of whether such a defense in the circumstances here is inherently destructive of employee rights. See, *Aztech Electric Co.,* 335 NLRB No. 25 (2001).

[38] Respondent hired Bufton as an operator in 2001. Bufton's application is dated February 15, 2001, and reveals that he was not referred by anyone. In hiring Bufton, Respondent by-passed applicant Larry Bailey, whose application is dated February 9, 2001. Bailey applied for the position of equipment operator or crewmember and his application reveals that his relative and then current employee Don Chapman referred him. Peter Crone testified Chapman was hired in 1998 and left Respondent's employ in the summer of 2002. In fact, Respondent also hired two laborers in 2001, who were not recommended by current employees, after Bailey applied, without hiring Bailey.

[39] Respondent hired Kruszynski and Knowles who responded to a newspaper ad in 2002.

[40] In hiring these two employees, Respondent by-passed applicants whose applications reveal employees referred them. Larry Bailey applied again on April 15, 2002, as a laborer, concrete worker, or machine operator using Chapman as a reference and Michael Edminster applied as a laborer on June 17, 2002, using Phinney as a reference. Both were not hired.

Respondent also argues that most of the alleged discriminatees only applied for positions as operators, and that Respondent only hired one operator in 2001 and one in 2002. However, except when it came to the union applicants, Respondent was not wedded to the position the applicant sought on his application in deciding whether to hire an applicant. In 2001, non-union applicant Harvey applied to be an operator, but Respondent hired him as a truck driver. Steven Dallas applied to be a driver or operator. However, he was hired as a driver/mechanic, and later became Respondent's mechanic. Frank and Phinney sought employment as a laborer or operator, and each was hired as a laborer.

There were a total of 17 union applicants who applied with Respondent in 2001 or 2002. Five of these individuals applied for both operator and laborer positions, and three others applied for all positions. Fourteen of the union applicants did not list a desired salary, or said that their requested salary was open or negotiable. Fourteen of the union applicants said they had a CDL trucking license or otherwise had experience as a truck driver. Four of the union applicants said they had experience as a mechanic, with Flisakowski stating he had 16 years experience as a mechanic and in trucking.[41] I find that some or all of the union applicants were qualified for the operator, truck driver, laborer, and mechanic positions respondent filled in 2002. I also find Respondent failed to establish an affirmative defense to the refusal-to-hire allegations under *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. Denied 455 U.S. 989 (1982), that Respondent would have taken the same action on the applications even in the absence of the applicants' union affiliation. See, *Nelson Electrical Contracting Corp.,* supra, slip op. at 2.[42] I therefore find Respondent refused to consider for hire the union applicants and for reasons set forth in detail in the Remedy section of this decision Respondent failed to hire Larson, plus seven of the other union applicants in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By informing an employment applicant it is reluctant to hire him because it does not want to have unnecessary situations with International Union of Operating Engineers, Locals 17, 17A, 17B, 1C, 17D, 17RA and 17S, Respondent violated Section 8(a)(1) of the Act.

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[41] Flisakowski applied on March 13, 2001, and stated on his application that his salary was open. However, Respondent hired non-union applicant Steven Dallas on July 18, 2001, as a driver mechanic although he only listed 7 years experience as a mechanic and 3 years experience as a truck driver compared with Flisakowski's reported 16 years of experience at each vocation. When he was hired in 2002, Lewis Dallas had a lengthier employment history as a mechanic than Flisakowski. However, Respondent did not find this factor to be determinative when it selected Steven Dallas over Flisakowski in 2001. Moreover, Flisakowski in addition to his background as a mechanic and driver reported a stronger background as an operator than either Steven or Lewis Dallas and the evidence has established that Respondent valued versatility in its employees. I have therefore concluded Respondent has failed to establish it would have hired the individuals it selected in 2002 over their discriminatees, absent their union membership, for the reasons set forth in detail above.

[42] I have considered Respondent's contention that it received 39 applications in 2001 and 2002, who, in addition to the 17 union applicants, were also not hired. Respondent hired a total of 15 slots in 2001 and 2002 for which union applicants were qualified. Union members' applications, including the applications of the individuals hired, represent 24 percent of the total number of applications received during this period; yet none were hired. I find this statistical analysis cuts against Respondent, not in its favor.

2. By failing and refusing to hire some and consider for hire all of the following named applicants because of their union affiliation and activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act:

Gerald Franz	Carl Larson	Mike Eddy
Chris Forward	David Saviano	Eric Maybee
Steve Boyd	Tom Catras	Herman Pryll
John Flisakowski	Angela Lambert	James L. Minter III
James Earhardt	Tom Kaszubowski	Tom Paluch
Gary Senozetnik	Wes Kless	

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist there from and to take certain affirmative action necessary to effectuate the policies of the Act. In *FES,* 331 NLRB 9, 14 (2002), the Board majority stated as follows:

> Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings. Assume, for example, that the General Counsel established at the hearing on the merits that the respondent had 10 openings, that 15 applicants had the experience or training relevant to the openings, and that anti-union animus contributed to the decision not to hire any of the 15 applicants for the openings. Assume further that the respondent did not meet its burden of showing that it would not have hired any of the 15 applicants even in the absence of their union activity or affiliation. In such circumstances, the General Counsel has established a refusal-to-hire violation. He has further established that a backpay and instatement remedy is appropriate for 10 of the applicants. The compliance proceeding may be used to determine which 10 of the 15 applicants must be offered backpay and instatement. The remaining five applicants would be entitled to a refusal-to-consider remedy.

The Board stated in *FES* that the remedy for a refusal-to-consider for hire violation is:

> …a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions. Id. at 15.

The Board held that, "Respondents will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance." Id. at 15, fn. 15.

I have concluded that Respondent unlawfully refused to hire Larson as an operator when he applied on April 15, 2002. I shall therefore recommend Respondent be required to offer Larson employment as an operator without prejudice to his seniority or other rights or privileges he would have enjoyed had he been hired, and make him whole for any loss he would have suffered as a result of Respondent's refusal to hire and to consider him for hire in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1989).

I have also concluded that the union applications filed in 2001 where still active in 2002.

Subtracting Larson's application, there are 16 remaining union applicants who applied in 2001 or 2002. The parties have fully litigated and briefed the status of 10 individuals who worked for Respondent in 2002, who the General Counsel maintains worked in positions that should have been accorded to the alleged discriminatees. I have concluded that Mark Lewis' was hired to position for which, but for the discrimination against them, the union applicants should have been considered and hired. Lewis was hired in the fall of 2002 as an operator after such a substantial separation from Respondent's work force, a minimum of 5 and probably closer to 10 years, that he could no longer be considered part of Respondent's work force when he was rehired in 2002. Unlike Lewis, and contrary to the contention of the General Counsel, I do not find that Respondent hired Leo Owens or Doug Cleveland in 2002 to positions for which the union applicants were eligible. Rather, the evidence shows that Respondent had a practice of employing both Owens and Cleveland on an intermittent but as needed basis, and that this practice had been going on for a period of years. I have therefore concluded that Owens and Cleveland were not new hires in 2002, but rather were seasonal employees.[43]

I find Respondent filled seven positions in 2002, which some or all of the remaining 16 union applicants, excluding Larson, were qualified to perform and eligible to be hired to, absent the discrimination against them.[44] Accordingly, I shall recommend that a determination as to which of the 16 discriminatees are entitled to instatement and to be made whole with interest in the manner described above to these seven positions be left for compliance. I shall recommend further that any discriminatees not offered instatement following the compliance determination be place in the pool of candidates for any openings that have arisen after the close of the hearing or that arise in the future and that the Regional Director, the Charging Party, and any discriminatees not offered instatement as a result of this order be notified in writing by Respondent when such openings arise and considered in accord with a nondiscriminatory manner for these positions until such time as the Regional Director determines that this case should be closed.

ORDER

The Respondent Eastern Summit Development, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employment applicants it is reluctant to hire them because it does not want to have unnecessary situations with the International Union of Operating Engineers, Locals 17, 17A, 17B, 17C, 17D, 17RA and 17S, or any other labor organization.

(b) Failing and refusing to hire, or to consider for hire, applicants for employment because of their membership in or activities on behalf of the International Union of Operating Engineers, Locals 17, 17A, 17B, 17C, 17D, 17RA and 17S, or any other labor organization.

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[43] Peter Crone testified that Katherine Fisk also worked for Respondent for a short time as laborer in 2002, and that she had done so on and off for the prior 8 years. Counsel for the General Counsel did not argue the alleged discriminatees' were entitled to Fisk's position, and for the reasons set forth above, I find that they were not.

[44] For purposes of clarity of the record, I find that the positions occupied by employees Chad Phinney, Lewis Dallas, Christopher Oakes, Russell Delahoy, Malcolm Metzler, Daniel Kruszynski, Mike Knowles, and Mark Lewis should have been granted to the discriminatees. I have reduced the actual number of positions remaining from eight to seven because I have given Respondent credit for the operator position I have required it to offer Larson, in that I have concluded that Respondent had a fixed intent to hire Larson but failed to due so due to his union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of the Board's Order, offer Carl Larson full instatement to an operator's position or a substantially equivalent position if that position is no longer exists, without prejudice to his seniority or any other right or privilege to which he would have been entitled absent the discrimination against him.

(b) Within 14 days from the date of the Board's Order, Make Carl Larson whole for any loss of earnings he may have suffered by reason of the discrimination against him as set forth in the remedy section of this decision.

(c) Offer seven of the following employees, to be determined as set forth in the remedy section of this decision, full instatement to a job for which they applied or are qualified to perform, or if those positions no longer exist to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absent the discrimination against them:

Gerald Franz	Wes Kless	Mike Eddy
Chris Forward	David Saviano	Eric Maybee
Steve Boyd	Tom Catras	Herman Pryll
John Flisakowski	Angela Lambert	James L. Minter III
James Earhardt	Tom K Kaszubowski	Tom Paluch
Gary Senozetnik		

(d) Make those employees named above who are offered instatement whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(e) Notify the Regional Director, the Charging Party and any of the above applicants not offered instatement in writing when openings arise and consider them in a nondiscriminatory manner for these positions until such time as the Regional Director determines that this case should be closed.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to employ or to consider for employment the discriminatees, including Larson, named above and within 3 days thereafter, notify them in writing that this has been done and that this personnel action will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Springville, New York, copies of the attached notice.[45] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

[45] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 8, 2002.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 17, 2003

Eric M. Fine
Administrative Law Judge

JD–31-03
Buffalo, NY

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT inform employment applicants we are reluctant to hire them because we do not want to have unnecessary situations with the International Union of Operating Engineers, Locals 17, 17A, 17B, 1C, 17D, 17RA and 17S, or with any other labor organization.

WE WILL NOT refuse to hire or consider for hire employment applicants because of their membership in or activities on behalf of the International Union of Operating Engineers, Locals 17, 17A, 17B, 17C, 17D, 17RA and 17S, or with any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Carl Larson an operator's position or if that position no longer exists to a substantially equivalent position, without prejudice to his seniority or any other right or privilege and will make him whole for any loss of earnings or benefits he may have suffered by reason of the discrimination against him, plus interest.

WE WILL, as directed by the Board, offer seven of the following applicants employment in positions for which they applied or are qualified to perform, or if such positions no longer exist to substantially equivalent positions, without prejudice to their seniority or any other right or privilege to which they would have been entitled and will make them whole for any loss of earnings or benefits they may have suffered by reason of the discrimination against them, plus interest:

Gerald Franz	Wes Kless	Mike Eddy
Chris Forward	David Saviano	Eric Maybee
Steve Boyd	Tom Catras	Herman Pryll
John Flisakowski	Angela Lambert	James L. Minter III
James Earhardt	Tom Kascibowski	Tom Paluch
Gary Senozetnik		

WE WILL notify the Regional Director, the International Union of Operating Engineers, Locals 17, 17A, 17B, 17C, 17D, 17RA and 17S, and any of the above applicants not offered employment in writing when openings arise and consider them in a nondiscriminatory manner for these positions until such time as the Regional Director determines that this case should be closed.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to employ or to consider for employment the applicants named above, including Carl Larson, and within 3 days thereafter, notify them in writing that this has been done and that this personnel action will not be used against them in any way.

EASTERN SUMMIT DEVELOPMENT, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.